



MTC ASSOCIATE NEXUS MODEL STATUTE

DRAFT 11/21/12

MTC Sales and Use Tax Subcommittee For Discussion Purposes Only

(1) A person who sells tangible personal property or services taxable under this Act to a purchaser in this state ("seller"), shall be presumed to have a presence sufficient for the state to require compliance with [cite state sales and use tax statute], through the in-state activities of a resident of this state, if the seller enters into an agreement, directly or indirectly, with the resident under which the resident, for a commission or other consideration based on completed sales, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller, and if during the preceding 12 months the cumulative gross receipts from sales by the seller to customers in the state who are referred to the seller by all residents with which seller has this type of an agreement is in excess of \$_____. [optional: and the cumulative gross receipts from sales by the seller to all customers in the state is in excess of \$_____.] This presumption may be rebutted by proof that the resident with whom the seller has an agreement did not engage in any solicitation in the state on behalf of the seller that would satisfy the nexus requirement of the United States constitution during the same preceding 12 months. An agreement under which a seller purchases advertisements from a resident of this state is not an agreement described in this section unless the advertisement revenue paid to the resident consists of commissions or other consideration that is based upon sales of tangible personal property or services. Nothing in this section shall limit or reduce this state's authority under other sections of this Act, agency regulations, or the United States Constitution, to require compliance with [cite state sales and use tax statute]. This Act shall become effective as of the date of enactment. For purposes of this section, "cumulative gross receipts" includes receipts from sales made during the 12-month period before the effective date of this act.

(2) A. A person who sells tangible personal property or services taxable under this Act to a purchaser in this state ("seller"), shall be presumed to have a presence sufficient for the state to require compliance with [cite state sales and use tax statute] if both of the following apply:

- (1) the seller and an in-state business maintaining one or more location within this State are related parties; and
- (2) the seller and the in-state business use an identical or substantially similar name, tradename, trademark or goodwill to develop, promote, or maintain sales, or the in-state business provides services to, or that inure to the benefit of, the out-of-state business related to developing, promoting, or maintaining the in-state market.

B. Two entities are related parties under this subsection if they meet any one of the following tests:

(1) both entities are component members of the same controlled group of corporations under section 1563 of the Internal Revenue Code¹;

(2) one entity is a related taxpayer to the other entity under the provisions of section 267 of the Internal Revenue Code²;

(3) one entity is a corporation and the other entity and any party, for which section 318 of the Internal Revenue Code³ requires an attribution of ownership of stock from that party to the entity, own directly, indirectly, beneficially, or constructively at least 50 percent of the value of the outstanding stock of the corporation; or

(4) one or both entities is a limited liability company, partnership, estate, or trust, none of which is treated as a corporation for federal income tax purposes, and such limited liability company, partnership, estate, or trust and its members, partners or beneficiaries own in the aggregate directly, indirectly, beneficially, or constructively at least 50 percent of the profits, capital, stock, or value of the other entity or both entities.

¹ <http://www.law.cornell.edu/uscode/text/26/1563>

² <http://codes.lp.findlaw.com/uscode/26/A/1/B/IX/267>

³ <http://www.law.cornell.edu/uscode/text/26/318>

Severability

If any of the provisions of this Act are found invalid by a court of competent jurisdiction, the invalid portion of the statute shall be severed without affecting the remaining provisions of this Act.

Definitions**Resident**

Any individual who maintains a permanent place of abode in this state is a resident. Permanent place of abode is a dwelling place maintained by a person, or by another for him, whether or not owned by such person, on other than a temporary or transient basis. The dwelling may be a home, apartment or flat; a room including a room at a hotel, motel, boarding house or club; a room at a residence hall operated by an educational, charitable or other institution; housing provided by the Armed Forces of the United States, whether such housing is located on or off a military base or reservation; or a trailer, mobile home, houseboat or any other premises.

Any corporation incorporated under the laws of [insert your state]; and any corporation, association, partnership, or other pass-through entity, or other entity that maintains a place of business in the State, or otherwise has nexus in the State for purposes of this act, is a resident.

Seller

A seller includes, but is not limited to, an entity, including a pass-through entity, affiliated with a seller within the meaning of Section 1504 of the Internal Revenue Code.⁴

Regulation

If the written agreement between the seller and the resident specifies that the resident may not engage in solicitation, then this presumption may be rebutted for any prior 12 month period by providing to the [Department] a copy of the agreement signed by both parties and a statement signed by the resident attesting that he or she did not in fact engage in any solicitation during that 12 month period.

⁴ Section 1504 (26 U.S.C. §1504) defines an affiliated group.
<http://www.law.cornell.edu/uscode/text/26/1504>